STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **NEWS AMERICA PUBLISHING, INC.** | : | DECISION<br>DTA No. 810530 |
| for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law. | : | |

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on June 29, 1995 with respect to the petition of News America Publishing, Inc., 1211 Avenue of the Americas, New York, New York 10036. Petitioner appeared by Squadron, Ellenoff, Plesent & Sheinfeld, LLP (Neal M. Goldman and Scott Friedman, Esqs., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

The Division of Taxation filed a brief in support of its exception and a reply brief. Petitioner filed a brief in opposition. Oral argument was heard on February 8, 1996.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioners Jenkins and Pinto concur.

## *ISSUE*

Whether an asset purchase agreement between petitioner and the transferee reasonably apportioned the consideration for the real property in a transaction which included the sale of real property, tangible personal property and intangible property.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, News America Publishing, Inc. ("News America"), is an indirectly, wholly-owned subsidiary of The News Corporation Limited whose chief executive is Rupert Murdoch. Until March 1988, News America was the owner and publisher of the New York Post, the oldest continuously published daily newspaper in the United States. A predecessor corporation of News America purchased the Post in 1976.

The real property owned by News America and used as the headquarters and publishing center of the Post is located at 210-218 South Street in lower Manhattan. Approximately 75% of the 1.58 acre site is occupied by a one, two and six-story manufacturing/loft building, originally built by the Hearst corporation in 1927 as a newspaper production and distribution plant. The building has always functioned in that capacity.

At the time the Post was purchased by News America, a Fair Market Value Report was prepared by Coats & Burchard Company where the real property was valued as follows:

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| Land | $ 17,400.00 |
| Land improvements | 11,088.00 |
| Building | 9,223,912.00 |
| Total | $9,252,400.00 |

In 1985, an affiliate of News America acquired the license to operate a television station, now called WNYW, in the New York City metropolitan area. Under cross-ownership regulations of the Federal Communications Commission ("FCC"), News America was not allowed to own both a television station and a newspaper in the same metropolitan area. News America sought and was granted a waiver of the cross-ownership regulations; however, the waiver was about to expire in the fall of 1987. As a result, petitioner was forced to divest itself of the Post prior to March 1988.

News America retained an investment banker, Allen & Company, Inc., to prepare an offering memorandum describing the Post, its business and its assets. The Allen & Co. offering

memorandum contains descriptions of: the newspaper market in the New York City metropolitan area; the Post's business, including its editorial policy; circulation, promotion and distribution of the newspaper; the Post's advertising revenues and policies; the Post's property, plant and equipment; its human resources and labor relations programs, including its collective bargaining contracts and pension and welfare plans; opportunities to improve performance of the newspaper business; and a financial summary. Excluding various tables and charts, the entire offering memorandum is 28 pages long. The real property which was included in the offering is described in the memorandum as follows:

> "The 210 South Street property consists of a newspaper plant, offices and a parking lot located on South Street between Catherine Slip Street to the south and Market Slip Street to the north. Fronting along the Franklin Delano Roosevelt Drive and the East River, the property is just north of the South Street Seaport and within one-half mile of the Wall Street financial district. The property is located in a high density area of mixed land use, primarily office and residential. Accessibility to the immediate area is excellent, and the property is located within one mile of four major traffic arteries. The total site area contains 68,867 square feet, all of which is owned in fee simple. The building occupies approximately 47,655 square feet of the plot. A parking lot is located behind the building and runs adjacent to Water Street. Portions of the fourth, fifth, and sixth floors are currently used by News America for corporate headquarters but will be available for lease to another tenant after the sale. The Post uses the remainder of the space.
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> "The building, constructed in 1927, has been well maintained. The gross rentable area is approximately 241,579 square feet. . . . The Post also leases, at an annual cost of $205,000, all the land located under the FDR Drive from the south side of Catherine Slip Street to the north side of Market Slip Street which encompasses a land area of approximately 83,000 square feet and provides parking for about 270 cars. This lease expires on October 4, 1989.
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> "The entire property has recently been appraised at a value of approximately $35 million. The appraisal is available for review upon request."

Table XXVII of the offering memorandum is a balance sheet which attributes the following book value to the Post's property and equipment as of June 28, 1987:

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| Land | $ 817,000.00 |
| Buildings | 11,461,000.00 |
| Equipment | 24,929,000.00 |
| Total Cost | $37,207,000.00 |
| Accumulated Depreciation | (20,986,000.00) |
| Net Property and Equipment | $16,221,000.00 |

The appraisal referred to in the Allen & Co. memorandum was prepared by Wm. A. White/Tishman Realty East, Inc. (White/Tishman) at the request of Allen & Co. (the "Tishman Appraisal"). It was authored by Robert Von Ancken, a member of the American Institute of Real Estate Appraisers as well as numerous other professional organizations. The stated purpose of the Tishman Appraisal was to estimate the fair market value of the real estate, exclusive of furniture, fixtures and presses. Fair market value is defined in the Tishman Appraisal, in pertinent part, as "[t]he most probable price in terms of money which a property should bring in a competitive and open market under all conditions requisite to a fair sale. . ." (Tishman Appraisal, p. 23). The Tishman Appraisal's estimate of the fair market value of the Post real property is based on its determination of the highest and best use (essentially, the most profitable use) to which the real property could be put. The highest and best use for the Post real property was said to be redevelopment for residential use. Since the property is zoned for industrial and commercial use, the Tishman Appraisal concluded that the alternative highest and best use would be as a commercial office building.

The Tishman Appraisal states that the Post building is adaptable to a wide range of purposes including, residential apartments, office space, a television studio, a hospital, a transient hotel and a publishing plant. The appraisal goes on to evaluate the demand for land to be used for such purposes. It rates as excellent the demand for land with a view of the East River and lower Manhattan to be used for residential housing. It rates as good the demand for institutional buildings for use by government entities. Concerning the demand for office space, the Tishman Appraisal states:

> "The demand for secondary office space near downtown has been static. Much of this type of space now exists in the older loft buildings of midtown south at rents of $20-$26 per square foot. The absorption has been slow after a quick pace in the initial stages during 1982-1985. Places such as downtown Brooklyn are able to offer new space at rents of $25.00/sq. ft. and reconditioned office space (Fulton Landing across River from subject) at $25.00/sq. ft. gross because of tax concessions and reduced electric costs." (Tishman Appraisal, p. 44.)

Assuming the highest and best use of the property to be for commercial office space, the Tishman Appraisal used three approaches to value the Post real property.

(a) The Income Approach. This approach was described as follows:

> "The Income Approach is based on the theory that value is the present worth of future benefits. The future benefits of ownership consist of the present value of the net income which will accrue to the holder of the property during the period of ownership plus the reversion of the property at the end of the investment holding period." (Tishman Appraisal, p. 62).

Using the Income Approach, the Tishman Appraisal began by estimating the gross potential income of the property as leased office space. The Tishman Appraisal projected that the Post real property could achieve an average rental of $22.00 per square foot inclusive of the parking area and $40.00 per square foot for the three-story high printing and storage area of the building. This approach to valuation indicated a value of $30,700,000.00.

(b) The Market Approach. This approach involved a comparison of the Post property with sales of fairly large loft buildings that were converted to office use after their sale. According to Mr. Von Ancken, comparable sales indicated a value of $135.00 per square foot of gross building area after adjustments for location, the age and condition of the Post building, building height and configuration. The Market Approach indicated a value of $35,600,000.00.

To reach the result he did, Mr. Von Ancken reviewed the sales of 10 office buildings deemed comparable to the Post building. Three were sold for amounts that computed to less than or equal to $82.17 per square foot. Four were sold for between $99.00 and $109.88 per square foot, and the remaining three were sold for $120.91 per square foot, $127.72 per square foot and $177.26 per square foot (this last building is located on Fifth Avenue across from Union Park near 16th Street). The Tishman Appraisal explains its valuation as follows:

> "The subject property is in an overall condition that is superior to most of these loft building sales, however, its location is isolated from other business uses and access to public transportation is only adequate. We have used the loft building sales at the high end of the range and made an upward adjustment to reflect the superior condition of the recently built executive offices on the 5th and 6th floors (+15%), plus the extra land on the site, the potential for enlarging the building, and the land leased across the street for parking (+5). The indicated unit value for the subject is $137.50/sf." (Tishman Appraisal, pp. 71-72).

(c) Market/Sales Comparison Approach. Using this approach the Tishman Appraisal valued the property as if it were vacant land. For commercial use, Mr. Von Ancken estimated a

land value based on comparable sales of $50.00 per square foot. Using a total FAR (floor area ratio) of 688,670 square feet, the maximum number of square feet that would be allowed for the real property, Mr. Von Ancken calculated a value of $34,400,000.00. Mr. Von Ancken determined that this valuation could be increased to $41,300,000.00 if the buyer could obtain a zoning variance allowing the construction of residential units.

The Allen & Co. offering memorandum and the Tishman Appraisal were made available to potential purchasers. At least four parties responded with preliminary bids ranging from $20 million to $40 million. Each of the bids was for the Post as an ongoing business; none was for the real property alone. All of the bids were contingent upon the negotiation of satisfactory bargaining agreements with each of the Post's unions. In the end, however, the only serious bidder was Peter Kalikow, an individual who was well known in the New York City area as a successful and prosperous real estate developer.

The negotiations which led to the purchase of the Post by Kalikow Media Incorporated ("KMI"), a corporation owned by Peter Kalikow, were described by Daniel F. Cremins, the chief operating and financial officer for Mr. Kalikow's real estate companies. Mr. Cremins has worked for Mr. Kalikow since 1975. His academic education was in the field of accounting, and he has worked from the time of his graduation from college in the area of real estate development. His position immediately before going to work for Mr. Kalikow was as the chief financial officer for a luxury high-rise development project in Iran. Mr. Cremins described Peter Kalikow at the time of the Post purchase as a man who had enjoyed inordinate success in the real estate market and who saw in the Post a new outlet for the expression of his creative energies.

Mr. Cremins asked Mickey Tarnepoll, a senior managing partner at Bear Stearns, Kalikow's investment banker, to evaluate the Allen & Co. offering memorandum. Mr. Kalikow and Mr. Cremins relied on their own expertise and experience to determine the value of the Post real property. The first thing they did after reviewing the Tishman Appraisal was to pay a visit to the Post property. After viewing the property, they disagreed with the appraisal.

Mr. Cremins stated that the location of the Post building, its distance from public transportation and the lack of suitable parking facilities made it unsuitable for residential or commercial office development.

The Post building faces the East River. A bulkhead or retaining wall is built along the waterfront. The City of New York operates a parking lot between the river and the street in front of the Post building. An elevated portion of the FDR Drive is directly over the street and shadows the lower floors of the Post building. The building is located between the Brooklyn and Manhattan bridges and is surrounded by several low to middle income housing projects, including Knickerbocker Village, the Alfred E. Smith Houses and Rutgers Houses, which effectively wall off the Post building from the neighborhoods beyond it. Mr. Cremins described the immediate vicinity of the Post as a "tough," crime-ridden neighborhood. The nearest subway station or bus stop is approximately a 20-minute walk from the Post. The leased parking space directly across the street from the Post building was poorly maintained and filled with potholes.

Mr. Kalikow entered into negotiations for the purchase of the Post with the intention of publishing a newspaper. He never had any interest in purchasing the Post building to develop it for residential or commercial use. Based on their knowledge of the New York City real estate market and their extensive experience in the field of real estate development, Mr. Cremins and Mr. Kalikow determined that the Post real property was usable only for the purpose for which it was built, a publishing plant, and they placed a value of approximately $16 million on the land and building.

One element of the sale was of great importance to both parties. This involved News America's union contracts, pension liabilities and other employee benefit programs. As of September 1987, 10 unions worked with the Post under collective bargaining agreements. The unions each maintained pension and welfare plans to which News America was legally obligated to contribute. If the Post had stopped publishing, News America would have been obligated (apparently by Federal law and by the contracts) to make severance and pension

payments to its unionized employees and, to some degree, to its non-union employees. According to a New York Times article published on February 25, 1988, the severance costs to the Post would have been about $40,000,000.00. Consequently, it was important to News America that the purchaser of the Post's assets continue to publish the newspaper and to assume the obligations of the Post under the union contracts. Mr. Kalikow agreed to assume those obligations; however, as a condition of purchase, he insisted on receiving significant union concessions which would save the Post $24 million in operating costs over three years. Eventually, News America and the unions negotiated a deal satisfactory to Mr. Kalikow. Mr. Murdoch was forced to contribute $3 million to reach the $24 million figure insisted upon by Mr. Kalikow. Mr. Cremins credibly testified that Mr. Kalikow would not have purchased the Post without the cost-saving agreement.

On February 5, 1988, News America and KMI executed an Asset Purchase Agreement by which News America agreed to sell all of the assets of the Post to KMI for $37,585,000.00. The purchase price of the assets sold was allocated in the contract as follows:

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| Machinery & equipment: | $ 4,000,000.00 |
| Real property: | 15,900,000.00 |
| Customer accounts: | 5,000,000.00 |
| Covenant not to compete: | 10,350,000.00 |
| Good will: | 2,335,000.00 |

Mr. Cremins was in charge of most of the negotiations with News America, but he relied on advisers to guide him in areas with which he was not familiar. Kalikow retained the services of two law firms, Strook & Strook & Lavan and Dreyer & Traub, to represent KMI in negotiations with News America. News America was represented by its regular outside counsel, Squadron, Ellenoff, Plesent & Lehrer ("Squadron, Ellenoff"). Mr. Cremins supervised the negotiations for Kalikow, and Arthur Siskind, then chair of the Squadron, Ellenoff corporate group, oversaw News America's legal representation.

Mr. Cremins and Mr. Siskind disagreed over the amount of time involved in negotiating the allocation of the purchase price to the various assets. Mr. Cremins stated that the whole process took no more than 10 minutes, while Mr. Siskind remembered the negotiations

continuing over a couple of days. Regardless of how long it took to agree to the final figures, it is clear from their testimony that both men had consulted with attorneys, accountants, investment bankers and other persons with knowledge of the nature and value of the assets before coming to an agreement on the allocations. KMI ascribed a value of $4,000,000.00 to four printing presses based on advice received from others (apparently Bear Stearns's representatives) who had examined the machinery and equipment. Other equipment was deemed to be of little value. The real property was valued based on the knowledge and experience of Kalikow and Cremins. Siskind agreed to the allocation since it was consistent with the value placed on the land and building by News America which was tied to News America's cost basis in the property of $13,900,000.00. The Tishman Appraisal was not considered by the parties in arriving at their allocation. The third item, identified as customer accounts, represented the value of certain large advertising accounts such as Macy's and The Wiz. The value of one-month's advertising revenue was used to allocate $5,000,000.00 to this asset. The most significant category from Kalikow's perspective was the covenant not to compete. Kalikow's litigating attorneys feared that Rupert Murdoch, through News America or another entity, would reenter the newspaper publishing market in the New York City area. Allocating $10,350,000.00 to the covenant would enable Kalikow to seek damages at this level if Murdoch did so. The remainder of the purchase price was allocated to good will.

Section 2 of the Asset Purchase Agreement provides, in pertinent part, as follows:

> "2.1 Purchase Price. The cash portion of the purchase price for the Assets shall be Thirty-Seven Million Five Hundred Eighty-Five Thousand ($37,585,000.00) Dollars, subject to adjustment as provided herein. In addition, Buyer shall assume certain of Seller's liabilities pursuant to Section 3 hereof."

Section 3 of the Asset Purchase Agreement, entitled Assumption of Liabilities, provides that the buyer is to assume certain enumerated obligations of the seller "to the extent that they are to be performed on or after the Closing Date." Paragraph (e) of section 3 relates to liabilities arising out of employee benefit plans. Paragraph (d) relates to employee vacation and severance pay whether or not such obligations arise under collective bargaining agreements

assumed by the buyer. Paragraph (f) relates to liabilities arising out of the operation of the Post after the closing date. Paragraphs (a), (b) and (c) of section 3 provide as follows:

> "3. Assumption of Liabilities. On the Closing Date, Buyer shall agree to assume and discharge, in accordance with their terms, only the following obligations and liabilities of Seller to the extent that they are to be performed on or after the Closing Date:
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> "(a) The liabilities of Seller as shall be set forth in the Working Capital Statement; and
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> "(b) All obligations of Seller relating to the Acquired Business under the agreements, contracts, commitments, leases, purchase contracts and sales contracts described in Schedules hereto or not required to be described therein (except as otherwise provided by Section 5 hereof) to the extent that payment or performance by Buyer under such agreements is in exchange for payment or performance to be provided to Buyer on or after the Closing Date, as the case may be, by the other party(ies) under such agreements; and
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> "(c) All obligations of Seller relating to the Acquired Business under other agreements, contracts, commitments, leases, licenses and agreements of Seller entered into between the date hereof and the Closing Date in accordance with this Agreement, or to the extent that Buyer consents to or otherwise agrees in writing to assume such obligations at or prior to the Closing Date (except as otherwise provided by Section 5 hereof) to the extent that payment or performance by Buyer under such agreements is in exchange for payment or performance to be provided to Buyer on or before the Closing Date, as the case may be, by the other party(ies) under such agreements."

A document entitled The News Corporation Limited / Determination of Loss on the Sale of the New York Post / March 7, 1988" was entered into evidence by the Division. It was referred to as the "working capital statement." Page 3 of that document apparently relates to paragraph (a) of section 3 of the Asset Purchase Agreement. It shows that News America's working capital at the time of closing (i.e., its current assets minus its current liabilities) amounted to a loss of $6,651,723.00. Of this loss, $6,013,410.00 was included by News America in its calculation of the loss on its sale of the Post.

Mr. Cremins testified that under paragraph (a) KMI agreed to collect all monies owed to News America before the closing date and to pay all current liabilities arising out of the operation of the Post before the closing date. At the end of a certain period of time, there would be a final accounting and settlement. If assets exceeded liabilities, KMI would pay News

America the excess. If liabilities exceeded assets, News America would reimburse KMI for the difference. In no case was KMI to be legally obligated to assume the debt of News America.

A dispute arose between the parties concerning the amounts due to News America under section (3) of the Asset Purchase Agreement and the side agreement relating to reduced labor costs. Apparently, the parties sued each other for breach of contract. The matter was settled by execution of an agreement of settlement dated October 25, 1988. Under the terms of that agreement, KMI agreed to pay News America $4,250,000.00 in settlement of all claims.

Section 17 of the Asset Purchase Agreement provides as follows:

> "Allocations. Buyer and Seller acknowledge that the allocations of the purchase price hereunder set forth in Exhibit 1 hereto were bargained for and negotiated, and each agrees to report the transactions consummated hereunder for Federal income tax purposes in a manner consistent with such allocations, and to file any statement required by Section 1060(b) of the Code."

Under section 8(c) of the Asset Purchase Agreement, if the gains tax on the sale of the real property exceeded $200,000.00 (for reasons other than a reduction in the seller's original purchase price) the buyer would pay the excess plus any penalties and interest due. Pursuant to section 14.1(v), the seller agreed to indemnify the buyer against "[t]he amount by which the monies paid by Seller pursuant to Section 8(c) is less than $200,000."

The sale of the Post to KMI and Peter Kalikow closed on March 7, 1988. News America and KMI timely filed the required real property transfer gains tax questionnaires reporting gross consideration for the transfer of the real property of $15,900,000.00. The original purchase price was claimed to be $14,199,246.28 yielding a gain subject to tax of $1,700,753.72. News America paid gains tax of $170,075.37. A copy of the Asset Purchase Agreement was forwarded to the Division of Taxation ("Division") with the questionnaires. A field audit was conducted by the Division in 1991.

The auditor did not testify concerning the audit method or results, but his reports were offered in evidence. The auditor made some adjustments to both the original purchase price claimed by News America and the amount of consideration reported.

In a narrative report, the auditor states that News America provided adequate records and documentation to substantiate the amount of the original purchase price claimed by the transferor. The auditor disallowed $219,911.00 of the original purchase price attributable to acquisition of the real property, stating in his report that the disallowance represents the difference between the amount shown in News America's general ledger and the amount claimed at the time of the transfer. News America claimed total capital improvements of $5,492,502.79. This represents $4,089,478.11 in costs claimed in News America's initial filing and an additional $1,403,024.79 claimed during the audit. The auditor disallowed $417,547.00 of the claimed total resulting in audited capital improvement expenses of $5,074,956.00. Original purchase price (as shown on a worksheet entitled Calculation of Acquisition -- Capital Improvement Cooping Costs) was determined to be $14,964,813.00.

The major area of dispute that arose during the field audit concerned the amount of consideration paid for the real property. The auditor determined that the total amount of consideration paid by KMI for all of the Post's assets exceeded the cash price of $37,585,000.00 recited in the Asset Purchase Agreement. According to the auditor's handwritten notes, the Division concluded that KMI had assumed certain liabilities in connection with its purchase of the Post but was unable to determine the nature or extent of the obligations. The auditor's notes state "it appears that the major obligations related to vacation, dismissal and severance pay costs that would be incurred by the buyer if the paper (NY Post) closed operations subsequent to the acquisition closing date. . . ." At the close of the audit, the amount of consideration for the entire transaction was found by the Division to be "undeterminable."

The auditor asked News America to submit a written explanation of the method used by News America and Kalikow to apportion the cash purchase price to the real property in order for the Division to make a determination regarding the reasonableness of that apportionment. A written explanation was not submitted.

On March 28, 1991, the auditor conducted a search of the Manhattan County Records Department and discovered that a mortgage for $25,000,000.00 had been recorded against the real property on June 14, 1988, approximately 2½ months after the closing occurred. The mortgagee in this transaction was Banker's Trust Company. The auditor requested that News America provide the Division with a copy of the appraisal submitted to Banker's Trust. In response, the Division was given a copy of the Tishman Appraisal.

On May 3, 1991, a meeting was held which was attended by representatives of the Division, News America and KMI. At this meeting, News America and KMI explained the method used to apportion the consideration to the real property. Primarily, it was claimed that the apportionment was the result of arm's length bargaining between a willing buyer and seller. KMI's representative stated that the Banker's Trust mortgage was not indicative of the fair market value of the real property since Mr. Kalikow also had to give his personal guaranty for the loan. News America also pointed out that the amount of $15,900,000.00 for the real property was reported for Federal income tax purposes by both parties. Finally, News America and KMI claimed that the amounts allocated to the covenant not to compete and to good will were reasonable.

The Division determined that the apportionment of the purchase price to the real property was not reasonable. This determination rested on several grounds. First, the Division noted that when News America acquired the Post in 1976 the real property was valued at $10,000,000.00. News America made capital improvements totalling over $5,500,000.00. Thus, its total investment in the real property amounted to $15,500,000.00. The Division considered it unreasonable to value the property at an amount that allowed so little for capital appreciation. Also, the Division concluded that total consideration included the assumption of liabilities and, therefore, the claimed consideration of $37,585,000.00 was only a portion of the total. Finally, the auditor concluded that News America had not demonstrated that "a reasonable method of apportionment was used in allocating the total consideration" (auditor's workpapers, schedule A).

After concluding that the parties' allocation was not reasonable, the Division determined that the fair market value of the property was $35.5 million, based on the Tishman Appraisal. The Division increased consideration for the real property by $19,600,000.00. Based on KMI's agreement to indemnify News America for any amount of gains tax exceeding $200,000 the Division then increased consideration by $2,059,466.00. As a result of the audit, the gain subject to tax was increased from $1,700,753.72 to $20,535,187.00, with a tax due of $2,053,519.00. Applying the equation found in section 590.9 of the gains tax regulations, the auditor calculated gains tax to be paid of $2,259,466.00. Tax paid by News America was subtracted from the audited tax due to compute a balance due of $2,089,391.00.

The Division issued to News America a Notice of Determination dated December 2, 1991 assessing gains tax of $2,089,391.00 plus penalty and interest.

At the time of the closing on the Post property, News America and KMI modified the gains tax indemnification provision by reducing the amount to be paid by News America to $170,075.37 (the amount actually paid at the time of transfer). KMI was then obliged to pay any amount of gains tax due over and above that amount.

In connection with the sale of the real property, Mr. Kalikow's attorneys, Dreyer & Traub, obtained title insurance from Ticor Title Guarantee Company in the amount of $15,900,000.00. Title to the real property was held by Mr. Kalikow in his personal capacity and not by KMI.

To obtain working capital for the operation of the Post and to finance the purchase, Peter Kalikow obtained over $80,000,000.00 in loans from Banker's Trust. Paul V. Reagan who was then vice-president and counsel in the Banker's Trust legal department explained the circumstances surrounding the bank's decision to extend credit to Kalikow. Mr. Reagan was generally responsible for supervising loans including the loans made to KMI and Kalikow.

Mr. Reagan confirmed Mr. Cremins's testimony that during the mid-eighties banks were competing with each other to provide credit to the real estate markets. In this case, Banker's Trust approached Mr. Kalikow with an offer to provide credit for the acquisition of the Post. The first proposal structured by the bank's loan officers was not approved by Banker's Trust.

Mr. Reagan thought this explained the fact that the financing was not completed until after KMI had closed on the sale.

A loan proposal memorandum prepared by Banker's Trust's loan officers describes some of the salient conditions of the loans and lines of credit extended to KMI and Kalikow. Each loan package is referred to in the memorandum as a "facility." Three facilities were approved. According to the memorandum, "[t]he purpose of the facilities is to finance Peter S. Kalikow's acquisition of the New York Post from Rupert Murdock (sic)."

Facility 1 was an unsecured line of credit in the amount of $35,000,000.00 extended to Peter S. Kalikow personally. Facility 2 consisted of four letters of credit in the following amounts and with the following expiration dates:

#1 $ 7,239,375.00 Projected Expiry 3/7/89
#2 $ 7,776,000.00 Projected Expiry 3/7/90
#3 $ 8,378,100.00 Projected Expiry 3/7/91
#4 $ 8,991,000.00 Projected Expiry 3/7/92

The purpose of the four letters of credit, is explained in the memorandum as follows:

> "Kalikow is acquiring The New York Post for $37.585MM. BTCo. provided a $37.585MM L/C to secure the purchase price for the contract of sale on February 15, 1988. At closing (3/7/88), Kalikow will return the $37.585MM to BTCo., pay $10.585MM in cash and sign a note to the seller for the remainder of the purchase price ($27MM) which is due and payable in 4 equal installments of $6.75MM over the next 4 years. The note bears an interest rate of floating prime. As such, the note and an assumed interest rate are secured by 4 L/C's as referenced above. The principal amount and the assumed interest rate total $32.4MM. . . . As each installment is paid, the L/C's will be returned."

The third facility was described as a term loan to Peter S. Kalikow in the amount of $25,000,000.00. The collateral for the loan was a first fee mortgage on the Post real property. In addition, the bank received a personal guaranty from Kalikow. The memorandum states: "To the extent that the appraised value of 210 South Street does not support the $25,000,000 loan on a 75% Loan to Value basis, Peter Kalikow will provide a principal guarantee of the difference." In evaluating the risk associated with this loan, the memorandum states:

> "With respect to the mortgage on 210 South Street, to the extent that BTCo.'s due diligence process reveals that the property is unable to support a $25MM Loan at a

> 75% Loan to Value, the difference in the appraisal value and the requested loan amount will fall under Peter S. Kalikow's personal guarantee."

By letter dated March 8, 1988, a loan officer informed Mr. Kalikow that Banker's Trust had approved a term loan to him in the amount of $25,000,000.00. That letter provides, in pertinent part:

> "You shall have the right to request more than one disbursement of the Loan, so long as the aggregate total of all advances shall not exceed $25,000,000.00 and the conditions set forth herein for closing shall be satisfied with respect to such advance. In such case, the note and mortgage amount may be changed to reflect the amounts of the advance. . . . The Loan shall be non-recourse, except that you shall guaranty payment of interest on the Note and the portion of the Loan outstanding as shall exceed 75% of the appraised value of the Premises as shown on the appraisal utilized by the Lender to satisfy the requirement in paragraph 1(a) in the annexed General Conditions."

As a condition of the $25 million loan, Mr. Kalikow was required to provide Banker's Trust with an appraisal and did provide a copy of the Tishman Appraisal. Banker's Trust also received Mr. Kalikow's personal guaranty and a first mortgage on the Post real property. The mortgage was executed on June 14, 1988 and recorded on June 21, 1988. On the date of execution, Mr. Kalikow executed a personal guaranty. Ticor Title Insurance Company issued to Banker's Trust title insurance on the real property in the sum of $25,000,000.00 as of June 14, 1988.

Mr. Reagan testified that it was Banker's Trust's belief, based on the Tishman Appraisal, that the loan to Mr. Kalikow in the amount of $25 million was secured by the Post real property. He also testified that the appraisal was a significant factor in the Post's decision to approve the loans to Kalikow. Under cross-examination Mr. Reagan was asked why Banker's Trust accepted the Tishman Appraisal rather than doing its own appraisal or causing an appraisal to be done for the specific purpose of determining the value of the real property as collateral for the loan. He replied that in his experience the reason was probably the expense involved in obtaining an appraisal, but he went on to state:

> "I think given [Kalikow's] net worth, given the desire of the bank to establish a substantial relationship with him, they would have been quick to agree to use the

> William White appraisal. I've seen it before. Subsequent to 1990, I don't believe we'd do it again." (Tr., p. 169.)

Mr. Reagan also testified that in his opinion use of the Tishman Appraisal to approve the loan "was a mistake" (tr., p. 169), and said that he found it incredulous that the property was appraised at $35.5 million in 1987.

At sometime after KMI's purchase of the Post, Peter Kalikow and Kalikow Real Estate Company commenced bankruptcy proceedings. A consolidated Chapter 11 Plan of Reorganization was filed in the United States Bankruptcy Court, Southern District of New York, on December 23, 1993. Eventually, Kalikow put the Post up for sale.

In 1991, Banker's Trust engaged Cushman & Wakefield, Inc., an appraisal service, to estimate the market value of the Post building as encumbered by a proposed lease to the New York Post. This appraisal was sought in connection with the bankruptcy proceedings of Peter Kalikow and Kalikow Real Estate Company. Cushman & Wakefield found that the market value of the real property (encumbered by the proposed lease) was $14 million as of September 1991. Cushman & Wakefield evaluated the highest and best use of the property in its condition as a newspaper printing plant and if vacant, to be held for future residential redevelopment. The Cushman & Wakefield Appraisal contains the following definition of highest and best use as defined in the Dictionary of Real Estate Appraisal, Second Edition (1989):

> "1. The reasonable and probable use that supports the highest present value of vacant land or improved property, as defined, as of the date of the appraisal.
>
> "2. The reasonably probable and legal use of land or sites as though vacant, found to be physically possible, appropriately supported, financially feasible, and that results in the highest present land value.
>
> "3. The most profitable use."

Cushman & Wakefield came to the following conclusions concerning the highest and best use of the Post real property.

> "In the course of our investigation, we determined that current market conditions do not warrant the re-development of the site. It is our opinion that the subject improvements should be used on an interim basis as, minimally, a light manufacturing building with an appropriate office component. The most efficient and truly highest and best use of the facility would be the continued utilization for newspaper publication. The latter utilization would maximize the office space finish

> and central printing press core of the subject. Further, it is our opinion that, after the interim use tenancy expires in an approximate 10 year period, the market conditions will warrant the re-utilization, or redevelopment, of the site into a residential application. Therefore, on an as-improved basis, it is our opinion that the subject improvements should be utilized to generate income on an interim use basis. Following this interim use period, the subject will be suitable for redevelopment into a residential use." (Cushman and Wakefield Appraisal, pp. 38-39).

In evaluating the market value of the property, Cushman and Wakefield concluded that rezoning of the property from light manufacturing to residential use was possible.

In February 1993, a corporation owned by Stephen Hoffenberg offered to purchase the Post real property for $15 million. Since Banker's Trust was a secured creditor of the property, its agreement to accept the offer was required, and it did agree. However, the final sale to Mr. Hoffenberg was never consummated.

In 1993, Mr. Reagan, on behalf of Banker's Trust, took part in negotiations for the lease of the Post real property to News America. Such a lease was executed between Peter S. Kalikow, as debtor and debtor-in-possession of the real property, and NYP Holdings, Inc. (apparently, a News America subsidiary or affiliate corporation) on October 1, 1993. The lease contains an option to purchase the real property at a price that varies depending on when the option is exercised. The option prices are from $7 million in the first year of the lease to $12.5 million in the fifth year of the lease. News America now operates the New York Post under a management agreement.

At about the time News America entered into the management agreement to operate the New York Post, it requested an appraisal of the real property from Edward S. Gordon Company, Inc. The report provided to News America consists of a three-page letter, dated April 2, 1993, in which the Gordon Company summarized its findings (hereinafter the "Gordon Report"). The Gordon Report concluded that the highest and best use for the site would be its continued use as a printing facility. The Gordon Report also states that the probability of finding a user, or tenant, for the property was very low. The Gordon Report did not estimate the fair market value of the real property.

Mr. Siskind testified that at the time the management agreement was entered into News America was making an application for waiver of the FCC cross-ownership rules in order to buy the Post. The Gordon Report was requested to help News America determine whether it wanted to purchase the Post, whether it should continue publishing in the Post building and how it should frame its purchase offer.

Attorneys for News America engaged Valuation Research Corporation ("VRC") to review the allocation of the purchase price of the Post as set forth in the Asset Purchase Agreement and to render an opinion as to its reasonableness. VRC undertook an investigation and appraisal of the fixed and intangible assets of the Post for the purpose of expressing an opinion of their fair market value as of March 3, 1988.

According to the VRC Report, consideration was given to the March 6, 1988 deadline set by the FCC for News America's compliance with the cross-ownership regulations. VRC's investigation led it to conclude that the fair market value range of the appraised fixed and intangible assets of the Post, as of March 3, 1988, was as follows:

| | Fair Market Value Range |
|---|---|
| Fixed Assets | |
| Land and Buildings | $15,600,000.00 - $15,950,000.00 |
| Machinery and Equipment | $7,032,000.00 |
| Intangible Assets | |
| Advertising List | $ 3,100,000.00 - 3,300,000.00 |
| Masthead | 1,700,000.00 - 2,500,000.00 |
| News Library | 1,000,000.00 - 1,500,000.00 |
| Non-compete Agreement | 8,200,000.00 - 11,700,000.00 |

Based on these fair market values, VRC gave its opinion that the allocations by asset category in the Asset Purchase Agreement were not unreasonable.

The appraisal of the real property was completed by Daniel T. Vigano, a vice-president of VRC and a Member of the Appraisal Institute. Many of Mr. Vigano's observations echoed statements made by Mr. Cremins and in the Cushman & Wakefield Appraisal. The building is described as being in an isolated location somewhat cut off from the neighborhoods in its immediate vicinity (Chinatown, the financial district, the City Hall area) by a ring of high-rise

apartment buildings. Public transportation is described as available but not readily accessible; however it is stated that there is ready access to the FDR Drive, the Battery Tunnel and the Brooklyn and Manhattan Bridges for vehicular travel.

Mr. Vigano concluded that the highest and best use of the property, and as improved, is the current use as an industrial or manufacturing building. With this assumption, Mr. Vigano appraised the value of the real property using two methods, the cost approach and the sales comparison approach.

The cost approach requires a determination of the fair market value of the land and an estimate of reproducing the capital improvements and then deducting for depreciation. Mr. Vigano considered the cost approach to be a reliable method for estimating the market value of an older building like the Post's. The cost approach indicated a market land value of $12,400,000.00 and a depreciated improvement value of $3,157,183.00. This resulted in an overall appraisal of $15,600,000.00.

The sales comparison approach is what the name suggests, an estimate of market value based on sales of similar properties within a similar period of time (described in the Tishman Appraisal as the Market Approach). The three sales selected by Mr. Vigano for comparison purposes occurred between May 1985 and May 1987. The buildings were all commercial properties suitable for light industrial use. Adjustments were made by Mr. Vigano to account for the different sizes of the three buildings (only one was as large as the Post building). The overall value of the Post building using the sales comparison approach was $60.00 per square foot or $15,933,300.00.

The Division presented the testimony of V. Vincent Lee, a qualified appraiser of real property, to support its contention that the Tishman Appraisal contains a reasonable estimate of the fair market value of the Post real property at the time of the transfer from News America to Peter Kalikow. In his testimony, Mr. Lee focused primarily on the Market/Sales Comparison Approach used in the Tishman Appraisal. Using that approach, the Tishman Appraisal determined a market value for the real property of $34,400,000.00 ($41,300,000.00 if converted

to residential use). The VRC Appraisal determined a market value of $15,933,000.00 using a sales comparison approach. In both cases the estimate of fair market value was based on a price of approximately $50.00 to $60.00 per square foot. Mr. Lee pointed out that the difference is due to the fact that the Tishman Appraisal valued the property as if vacant land and assumed the demolition of the existing building and the use of the entire site for a new building while the VRC Appraisal assumed the rental of the existing building.

Mr. Lee made the point that the real property on which the Post building is located is an extremely unusual site for the City of New York because of its size. Although the existing building has 265,555 square feet of floor space it is located on a land area of 68,867 square feet which would allow a building with a FAR of 830,000 square feet to be built on the land. Mr. Lee considered it reasonable to value the property as vacant land and to build to the maximum FAR.

Mr. Lee also testified that the determination of highest and best use for the property is critical to the appraisal, since different assumptions will yield very different results. Mr. Vigano concluded that the highest best use for the Post building in 1988 was as a light industrial or manufacturing building and for comparison purposes used loft buildings used for those purposes. The Tishman Appraisal concluded that the highest and best use would be to redevelop the property for a residential use, or, alternatively, as a commercial building and for its comparisons used loft buildings converted to commercial office space.

Mr. Lee testified that in 1987 the New York real estate market was in a "speculative bubble" and, as he put it, investors like Kalikow "built up fortunes of tens or hundreds of millions of dollars converting things to other things. . ." (tr., p. 316). In light of the market conditions existing in 1987 and 1988, Mr. Lee considered the Tishman Appraisal, especially its highest and best use analysis, to be reasonable. In fact, he found it extremely thorough, reliable and consistent with professional standards of appraisal. Mr. Lee considered the VRC Appraisal of the real property to be unreasonable because in his opinion it did not adequately address the available building area and assumed a highest and best use as an industrial or light

manufacturing building. He also expressed his discomfort with the VRC report, falling just short of stating that Mr. Vigano lacked independence.

Mr. Lee did not offer an analysis of the comparable sales used in the Market Approach segment of the Tishman Appraisal. He did dispute Mr. Cremins's statements regarding the condition of the neighborhood immediately around the Post. He testified that the neighborhood is a stable area of mixed use, not unusually crime ridden or worn for lower Manhattan. As a consequence, he did not believe that the Post property was unsuitable for commercial office development.

The Tishman Appraisal determined a value of $30,700,000.00 using an income approach. Mr. Vigano did not use the income approach in his valuation because the property did not generate income which he believed made it impossible to determine income expectancy for the building. Mr. Lee did not review the income approach as used in the two appraisals.

Mr. Vigano testified that developing the Post real property to its maximum FAR would be unrealistic and speculative. Based on data showing an excess of office space in Manhattan even before the stock market crash of October 1987 (including the Tishman Appraisal), Mr. Vigano stated his opinion that it was inconceivable that a real estate developer would have undertaken development of such a massive office building at the time the Post was sold to Mr. Kalikow.

***OPINION***

Tax Law § 1441(1) imposes a tax of ten percent on the gain derived from the transfer of real property in New York State. "Gain" is measured by the difference between the consideration for the transfer of real property and the original purchase price of such property (Tax Law § 1440[3]). "Consideration" is "the price paid or required to be paid for real property or any interest therein" (Tax Law § 1440[1][a]). Pursuant to section 1440(1)(c), when assets in addition to real property are transferred and there is no reasonable apportionment of the consideration for such real property, "consideration" means that portion of the total consideration which represents the fair market value of such real property or interest. In

section 590.11 of the Commissioner's regulations (20 NYCRR), the apportionment of consideration is addressed as follows:

> "(a) Question: How is the consideration for the real property or interest therein ascertained when the transfer includes an interest in real property and other assets?
>
> "Answer: In the case of a transfer which includes other assets which are in addition to real property or an interest therein, the consideration must be reasonably allocated between the real property and the other assets pursuant to a written agreement signed by both the transferor and transferee. If there is no reasonable apportionment of the consideration for such real property, the consideration is that portion of the total consideration which represents the fair market value of such real property" (20 NYCRR 590.11).

Petitioner and its transferee allocated the purchase price of the assets sold in their Asset Purchase Agreement between machinery and equipment, real property, customer accounts, covenant not to compete and good will. In her determination, the Administrative Law Judge reviewed the standard for judging the reasonableness of an apportionment of consideration which was established by this Tribunal in Matter of Shareholders of Beekman Country Club (Tax Appeals Tribunal, April 16, 1992, affd sub nom Matter of Beekman Country Club v. Wetzler, 199 AD2d 640, 604 NYS2d 989) and Matter of Bridgehampton Investors Corp. (Tax Appeals Tribunal, August 11, 1988).

In Beekman, the petitioners transferred their interest in a corporation in which they held 100% of the outstanding shares of stock. The assets to be transferred consisted of a 565 acre public golf course, restaurant and pro shop and machinery, equipment and other items of personal property. Subsequent to the date the option to purchase was executed, petitioners and the transferee entered into an Allocation Agreement which apportioned the consideration as $6,390,955.09 for the reasonable value of the real property and $409,000.00 as the approximate value of the tangible personal property. The sole purpose of the Allocation Agreement was to provide an allocation of the consideration for purposes of the real property transfer gains tax. The petitioners submitted an appraisal to the Division prior to the closing date of the sale of stock and argued that this appraisal established the fair market value of the real property at

$3,400,000.00. The Tribunal upheld the allocation of value contained in the Allocation Agreement. We stated:

> "absent any evidence that the apportionment in the Allocation Agreement was unreasonable, Tax Law § 1440(1)(c) was satisfied because there was 'an apportionment of the fair market value of the interest in real property to the controlling interest for the purpose of ascertaining the consideration for the transfer of such controlling interest.'
>
> ". . . In order for us to consider the appraisal, petitioners must prove that the method of apportionment embodied in the Allocation Agreement was unreasonable because, as discussed above, that method of apportionment indicated what the Transferee was willing to pay for the real property and it also satisfied the apportionment requirement of Tax Law § 1440.1(c)" (Matter of Shareholders of Beekman Country Club, supra).

Further, we found that the appraisal submitted did not establish the true fair market value of the real property. Therefore, we held that the petitioners did not meet their burden "of proving that the appraisal reflected the fair market value of the real property as required by statute and that the Allocation Agreement was unreasonable because it did not reflect the fair market value of the real property and because it failed to apportion part of the consideration to the value of the Corporation as a business" (Matter of Shareholders of Beekman Country Club, supra).

In Bridgehampton, the petitioner's contract of sale specifically stated that the purchase price was "solely for the real property, special use permit for the club and the buildings and improvements thereon, which constitute the Premises; no separate portion of the purchase price is attributable to the personal property included in this sale." The petitioner sought to lower the amount of consideration attributable to the real property transferred by submitting an appraisal. We held that the petitioner had the burden of establishing that the contractual allocation was unreasonable and without an unreasonable allocation, the appraised value of the property was not relevant. Further, the appraisal that was submitted did not establish the fair market value of the property.

Relying on these cases, the Administrative Law Judge in the present case concluded that there was "no question that petitioner carried its burden of establishing the existence of a

reasonable apportionment of the consideration to the real property and that the burden then shifted to the Division to show that the apportionment was not reasonable" (Determination, conclusion of law "B"). She found evidence that the apportionment contained in the asset purchase agreement was bargained for by the parties, it resulted from arm's-length negotiations and it was contractually binding on both of them. "It was reasonable," she concluded, "for the parties to affix a price for the real property based upon its intended use, and every fair market value appraisal of the Post real property as a newspaper printing plant is consistent with the value assigned to the property in the apportionment agreement" (Determination, conclusion of law "C"). She concluded that "[i]n short, a contractual agreement is, in and of itself, prima facie evidence of a reasonable apportionment, and, in the face of such an agreement, the burden of proof is on the party challenging the apportionment" (Determination, conclusion of law "A"). As a result, she determined that "News America has established that the apportionment agreement is a reasonable apportionment of the consideration to the real property" (Determination, conclusion of law "C").

On exception, the Division argues that petitioner bears the burden of demonstrating that there was a reasonable apportionment of the total consideration to the real property. The Division relies on the White-Tishman Appraisal as evidence that the fair market value of the real property is $35 million and the Administrative Law Judge should have considered this appraisal in determining whether the apportionment of consideration was reasonable. This appraisal was the only written contemporaneous appraisal and it was accepted and relied on by Banker's Trust as the basis for giving a $25 million mortgage loan. Further, the Division believes that the apportionment of consideration was not the result of an arm's-length transaction because a disproportionately small amount of total consideration was assigned to the real property while more than one quarter of the consideration was assigned to the covenant not to compete. The Division believes that the total consideration for the transfer was in excess of the $37,585,000.00 cash portion of the purchase price. It argues "[t]he assumed liabilities are undoubtedly additional consideration, and as such, <u>must</u> be considered in determining whether a

reasonable apportionment exists" (Division's brief, p. 12). The Division urges that it was not required to show that the apportionment was unreasonable or to demonstrate the value of the liabilities assumed by the transferee on sale.

In opposition, petitioner argues that the apportionment agreement was an arm's-length agreement which shifted the burden of proof or at least the burden of going forward to the Division to show that it was unreasonable. Reliance by the Division on the White-Tishman appraisal was misplaced because it reflected only the transferor's side of the transaction and it did not value the property as an operating newspaper plant which was what was bargained for and sold. Petitioner argues that its allocation of consideration to the covenant not to compete was reasonable and there is no evidence in the record to the contrary. Petitioner argues that the presumption of reasonable apportionment places the burden of going forward on the Division to rebut the allocation of a zero amount to the indemnification agreement. Petitioner claims that the only evidence produced by the Division to rebut petitioner's valuation of this indemnification agreement was a newspaper article. Further, even if this agreement had value, it was contingent and could not be valued until such time as the contingency was resolved. Most importantly, the liabilities which are the subject of the indemnification agreement related to the operation of the newspaper business and not to the value of the real property.

We agree with the determination of the Administrative Law Judge with one exception: we do not agree that the burden of proof always falls on the party who seeks to show that the apportionment agreement was unreasonable. The burden of proof in hearings before the Division of Tax Appeals, as opposed to the burden of going forward with evidence, falls on the petitioner, except as otherwise provided by law (20 NYCRR 3000.10[d][4]). "The burden of proof as to each issue is determined before trial and remains upon the same party throughout the trial. The burden of going forward with the evidence, on the other hand, does shift from one party to the other in the course of the trial" (Richardson, Evidence § 96 [Prince 10th ed]). In Bridgehampton and Beekman, it was the petitioners who sought to show that the apportionment agreements were not reasonable. The burden of proof fell on the petitioners because, as

petitioners, they were required to demonstrate that the Division's denial of the refund was improper. That same burden to show error on the part of the Division falls on petitioner in this case.

As the Administrative Law Judge concluded, the existence of an arm's-length agreement containing an apportionment of the purchase price between real property and other assets provides a rebuttable presumption that such an apportionment is reasonable. "As a general rule, the effect of a presumption is to place the burden upon the adversary to come forward with evidence to rebut the presumption; that is, to negative the existence of the presumed fact. Once the adversary introduces sufficient evidence to the contrary, the presumption disappears from the trial" (Richardson, Evidence § 58 [Prince 10th ed]). Therefore, once prima facie evidence of a reasonable apportionment was introduced and the presumption established, the party seeking to rebut this presumption had the burden of going forward and introducing sufficient evidence to the contrary. In this case, that party was the Division. The Administrative Law Judge concluded and we agree that the Division did not introduce sufficient evidence to rebut this presumption. The Division's position was premised on an assumption that the White-Tishman appraisal is the only reasonable estimate of the fair market value of the property. If that premise is accepted, then that appraisal renders the contractual apportionment inherently unreasonable. However, we do not accept the Division's premise. Rather, we agree with the analysis and conclusion of the Administrative Law Judge that the apportionment agreement was reasonable and, therefore, there was no need to establish the fair market value of the property in order to apportion the consideration for the transfer.

Each of the issues which the Division raised in its exception were presented to and considered by the Administrative Law Judge. With the exception of the issue of the burden of proof discussed above, we find that the Administrative Law Judge correctly and adequately addressed all of the issues raised before her and we affirm her determination for the reasons stated therein. By our decision herein, the Division is precluded from further review (Tax Law § 2016) and we need not consider the issue of whether petitioner is liable for penalty.

We note that in its brief in opposition, petitioner requested a refund "because of an increased basis attributable to certain improvements not previously accounted for and to additional costs of sale which were not previously deducted" (Petitioner's brief, p. 46). These same issues were raised before the Administrative Law Judge and were decided adversely to petitioner. Since petitioner did not take an exception to the determination on these issues, they are finally determined and cannot be considered herein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of News America Publishing, Inc. is granted; and
4. The Notice of Determination dated December 2, 1991 is cancelled.

DATED: Troy, New York
January 2, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner